courtkutchehry.com

Company : Sol Infotech Pvt. Ltd.

Website : www.courtkutchehry.com

Printed For :

Date : 24/08/2025

Vithal Bakula Kokate Vs Podar Mills Unit of National Textile Corporation Ltd. and Others

Court: Bombay High Court

Date of Decision: Feb. 9, 2005

Acts Referred: Bombay Industrial Relations Act, 1946 â€" Section 3(13), 42, 78, 79
Constitution of India, 1950 â€" Article 226
Industrial Disputes Act, 1947 â€" Section 2

Citation: (2005) 3 BomCR 80 : (2005) 106 FLR 351 : (2005) 2 LLJ 888 : (2005) 2 MhLj 561

Hon'ble Judges: D.Y. Chandrachud, J

Bench: Single Bench

Advocate: S.N. Deshpande, for the Appellant; I.A. Sayed, Respondent No. 1, for the Respondent

Judgement

1. The petitioner who was engaged by the first respondent as a Super Senior Assistant retired from service on completing the age of Sixty. The

application filed by the petitioner under Sections 78 and 79 of The Bombay Industrial Relations Act, 1946, has been dismissed by the Labour

Court and that order has been confirmed in appeal (BIR No. 84 of 1998) by the Industrial Court. Both the Courts have come to the conclusion

that the petitioner was not an ""employee"" as defined in Section 3(13) of the BIR Act and consequently, the Court would not have jurisdiction under

the provisions of the Act to entertain the application.

Section 3(13) of The Bombay Industrial Relations Act, 1946, defines the expression ""employee"" as follows :--

(13) ""employee"" means any person employed to do any skilled or unskilled work for hire or reward in any industry, and includes --

(a) a person employed by a contractor to do any work for him in the execution of a contract with an employer within the meaning of Sub-clause

(e) of Clause (14);

(b) a person who has been (dismissed, discharged or retrenched or whose services have been terminated) from employment on account of any

dispute relating to change in respect of which notice is given or an application made u/s 42 whether before or after his dismissal, discharge,

retrenchment or, as the case may be, termination from employment);

(but does not include --

(i) a person employed primarily in a managerial, administrative, supervisory or technical capacity [drawing basic pay (excluding allowances)

exceeding [one thousand rupees per month;]

(ii) any other person or class of persons employed in the same capacity as those specified in Clause (i) above irrespective of the amount of the pay

drawn by such persons which the State Government may, by notification in the Official Gazette, specify in this behalf;]

For the purpose of this proceeding, what is material is the expression ""employee"" as defined by the Act which means any person employed to do

any skilled or unskilled work for hire or reward in any industry. The expression however, does not include a person employed primarily in a

managerial, administrative, supervisory or technical capacity drawing basic pay in excess of Rs. 1000/- per month.

2. The petitioner joined the services of the respondent Mill on 21-11-1965 as a workman and was thereafter promoted as a Departmental

Assistant, Junior Assistant, Senior Assistant and Super Senior Assistant. On being served with a memo of retirement dated 16-2-1998, the

petitioner instituted proceedings under Article 226 of the Constitution of India, before this Court. An affidavit-in-reply was filed by the first

respondent in which in paragraph No. 3 it was sought to be submitted that the petitioner was employed in a supervisory and technical post and that

therefore, he did not fall within the ambit of Section 3(13) of the Act. The relevant averment in that affidavit reads as under :--

The petitioner was promoted as Super Senior Asstt. Master on 15-7-1997 and his basic salary was Rs. 13-5-05-1605EB-50-1905. His main

duties were supervisory and technical in nature. Therefore, the petitioner does not fall within the ambit of Section 3(13) of B.I.R. Act.

Before this Court, in paragraph 4, it was then also sought to be submitted that the petitioner was also covered by Model Standing Order 26A

which provides that the age of retirement of an employee other than an operative would be 60 years. When the petition came up before a Division

Bench of this Court consisting of the Hon"ble the Chief Justice Mr. Justice M.B. Shah (as he then was) and

Mr. Justice A.Y. Sakhare, the petitioner applied for leave to withdraw the petition for raising the dispute before the Industrial Court, and while

permitting withdrawal, the Court specifically recorded the objection of the first respondent that the petitioner was not covered by The Bombay

Industrial Relations Act, 1946. All the contentions of the parties were kept open. The order of the Court reads thus :

Considering the affidavit in reply, the learned Counsel for the petitioner seeks leave to withdraw this petition for raising the dispute before the

Industrial Court.

3. Permission to withdraw the petition is granted. Petition stands disposed of as withdrawn.

4. It is open to the petitioner to approach the alternative forum for redressal of his grievance, The learned Counsel for the respondents states that

the petitioner is not governed by the Bombay Industrial Relations Act. Considering the dispute involved in this matter all the contentions are kept

open.

3. After the order of the Division Bench, the petitioner served an Approach notice on 26-3-1998 raising a demand, and that having not elicited a

response from the first respondent, moved before the Labour Court an application under Sections 78 and 79 of the Act. In the written statement, it

was inter alia averred by the first respondent that the petitioner was not an employee as contemplated under The Bombay Industrial Relations Act,

1946, and therefore, the application that was filed, was not maintainable. It was submitted that the petitioner was working as a Super Senior

Assistant and was placed in the pay scale of Rs. 1305-1905/- which was applicable to the technical and supervisory staff. Having said this, it was

also submitted that the Model Standing Orders in respect of Operatives were not applicable to the petitioner and that he would be governed by the

age of retirement that was 60 years for non-operatives in Model Standing Order 26A. Evidence was adduced before the Labour Court. The

Labour Court came to the conclusion that the petitioner was not an employee within the meaning of Section 3(13) of the Act, since he was

employed primarily in a supervisory capacity on a basic pay in excess of Rs. 1000/-. The order of the labour Court was confirmed in appeal by the

Industrial Court.

4. Counsel on behalf of the petitioner submits that the petitioner was sought to be retired under Standing Order 26A which prescribed the age of

retirement as 60 years (or such other age as agreed upon between the employer and employee by an agreement or settlement). The employer

having taken the position that the petitioner was liable to be retired under Standing Order 26A, this would operate as estoppel from submitting that

the provisions of the Act were not applicable. Reliance was placed on the affidavit filed in the proceedings before this Court in Writ Petition No.

483 of 1998 and it was submitted that the employer was disentitled to challenge the jurisdiction of the Industrial Court having conceded that the

case of the petitioner was governed by Model Standing Order 26A. Counsel further submitted that the petition was withdrawn on the basis of the

affidavit and that being the case a position contrary thereto could not be adopted before the Labour and Industrial Courts.

5. Both the Courts rejected this submission holding that in the petition which was filed before this Court in the earlier proceedings the employer

clearly set up the defence that the provisions of the Act were not applicable to the petitioner on this ground that he was not an employee within the

meaning of Section 3(13) of the Act and, in any event, the order of the Division Bench dated 17th March, 1998 recorded the contention of the first

respondent that the petitioner was not governed by the Bombay Industrial Relations Act, 1946. All the contentions were left open by the Division

Bench. Evidence was adduced before the Labour Court and on the basis of the evidence, it was found that the petitioner worked in a supervisory

capacity and was not therefore, an employee within the meaning of Section 3(13) of the Act.

6. Now it is necessary to note while considering the submission of the petitioner that in paragraph 3 of the affidavit which was filed before this

Court in the earlier proceeding which was instituted by the petitioner to challenge his retirement, it was specifically submitted by the employer that

the main duties of the petitioner on his promotion as a Super Senior Assistant were supervisory and technical in nature and therefore, he did not fall

within the ambit of Section 3(13) of the Act. In view of this, it was then submitted that the recruitment rules and regulations provide in Clause 18

that the age of retirement would be 58 years. Having said this, the management submitted that under Standing Order 26A an employee who is not

an operative would be liable to retire on completing the age of 60 years. Hence, it clearly appears that the contention of the management was

primarily that the petitioner was not an employee within the meaning of the provisions of Section 3(13) of Bombay Industrial Relations Act, 1946.

In addition, it was also urged that in any event the age of retirement for a person who was a ""non operative"" was 60 years in Standing Order 26A

and that on attaining this age, the petitioner had been retired. The same position was adopted in the written statement before the Industrial Court.

In the first paragraph of the written statement, the defence that the application was not maintainable since the petitioner was not an employee, was

set up at the forefront, Above all, the order of the Division Bench dated 7th March, 1998 kept the question as to whether the Bombay Industrial

Relations Act, 1946 would be attracted open and that was in the light of the submission of first respondent that the Act was not attracted. In this

background the finding which has been arrived at by both the Courts below that estoppel did not operate in the present petition, does not warrant

interference under Article 226 of Constitution of India. The view which has been taken by both the Courts, is the correct view. Even if it was a

possible view to take on the interpretation of the material on record, it would not be interfered with under Article 226 of Constitution of India, in

view of the settled position governing the exercise of this jurisdiction.

7. The essential issue the Court is now required to consider is the correctness of the finding which was arrived at to the effect that the petitioner

was employed in a supervisory capacity with a salary in excess of the threshold limit, as a result of which he is not an employee within the meaning

of Section 3(13) of the Act. An employee within the meaning of Section 3(13) of the Act is a person who is employed to do skilled or unskilled

work for hire or reward in any industry. The evidence of the petitioner does not show and there was no documentary evidence produced on his

part, to demonstrate that the duties which he has performed, brought him within the scope of the definition of the expression ""employee"" u/s 3(13)

of the Act. However, there was positive evidence on behalf of the employer to which it is necessary to turn, but before doing so, it would be

necessary to note certain crucial admissions of the petitioner during cross-examination. First, the petitioner admitted the authenticity of the ""short

leave passes"" that were showed to him during the course of cross-examination. He admitted that these passes bear his signature and that he had

signed thereon as a departmental head. Second, the petitioner admitted that the officers and the members of staff of the company (in distinction to

the workers) received leave travel concession of an amount equivalent to 60% of their monthly wages or Rs. 3000/- whichever was less. The

petitioner admitted that he has received Rs. 3000/- as leave travel concession. Third, the petitioner admitted that he had made a self assessment for

the purpose of his own confidential reports. Fourth, the petitioner admitted that other senior assistants in the Spinning Department had been retired

by the Management upon completing the age of 60 years.

8. The witness for the management Shri. S.V. Tirodkar sought to establish the case that the petitioner was an employee in the managerial cadre

and among the reasons on the basis of which this was sought to be established was the ""self assessment"" that was carried out by the petitioner.

There was, it must be noted, no cross-examination insofar as the issue of ""self assessment"" is concerned and as already noted the petitioner himself

admitted in the course of his cross-examination that he had carried out a self appraisal in his confidential report. The Industrial Court in its

confirming order has devoted a considerable degree of attention to the nature of the duties of the petitioner that would emerge from his self

appraisal form. The Industrial Court was justified in doing so, since the question whether a person is or is not an employee within the meaning of

Section 3(13) of BIR Act, must turn on the nature of the duties; the primary and dominant duties at that. The Industrial Court noted that the salient

aspects of the job performed by the petitioner emerge from the self appraisal form and that the petitioner was incharge of the preparatory which

included taking charge of the department in the morning; deciding upon mixing cotton as well as polyester blends; planning and organising the

working pattern for all the three shifts; checking productivity and quality for all the preparatory machines; control and processing of waste; labour

control; and planning, organizing, and processing of blended raw materials. The petitioner has stated that he had suggested a cost-effective system,

leading to a significant saving for the organization. This document was signed by the petitioner on 30-4-1997, after his promotion as Super Senior

Assistant on 7-3-1997. The Industrial Court noted that the performance appraisal form at Ex. C-21 was meant only for persons in the managerial

category namely at the level of Deputy Masters, Technical and Supervisory staff and above. The petitioner used to sign the muster meant for

technical and supervisory staff. The petitioner was also signing leave applications in his capacity as a departmental head. On this state of record,

the findings of the Industrial Court cannot, in my view, be faulted. The clear admissions on part of the petitioner during the course of his cross-

examination coupled with the evidence adduced on behalf of the Management and the duties of the petitioner as they emerge from the self

appraisal form, show that the petitioner was a departmental head. As departmental head he performed supervisory duties and in that capacity was

performing several functions including signing leave applications. The evidence on record, is therefore, sufficient to sustain the findings of the

Industrial Court.

9. In this view of the matter, the subsidiary question as to whether the petitioner was a non-operative to whom the age of retirement would be 60

years under standing Order 26A really loses significance. The management proceeded on the basis that the petitioner would be governed by

Standing Order 26A when it issued a memo of retirement. Insofar as the proceedings before the Labour Court and the Industrial Court are

concerned, the application under Sections 78 and 79 of the Act was on the basis that the petitioner was an ""employee"" within the meaning of

Section 3(13) of the Act. Once it is held that the petitioner was not an employee as defined, both the Courts were justified in holding that their

jurisdiction to adjudicate would not be attracted. Before both the Courts below, as before this Court reliance was sought to be placed on two

decisions of learned Single Judges of this Court dealing with the question of estoppel. The first decision of Mr. Justice B. N. Srikrishna (as the

Learned Judge then was) in S.A. Sarang v. W.G. Forge and Allied Industries Ltd. 1995(1) CLR 837 involved a situation where a chargesheet had

been issued to a workman on 30-8-1976 charging him with mis-conduct under the Model Standing Orders. The decision of this Court however,

did not turn on an isolated reference to Model Standing Orders in the chargesheet which is evident from the following observations :--

Since the contention appears to be based on documents on record and on a so called admission of the first respondent, though earlier documents

had not been placed before the record of the Labour Court, at my instance Dr. Kulkarni has brought to my notice Show Cause Notices and

chargesheet given to the petitioner on earlier occasions. They are, Show Cause Notice dated 23rd August, 1971, Show Cause Notice dated 4th

December, 1972, Show Cause Notice dated 21st March, 1974, chargesheet dated 1st July, 1974 and Show Cause Notice dated 28th

September, 1974. Dr. Kulkarni was directed to place on record true copies of the said documents, which he did by filing a compilation containing

the true copies of the said documents, which are placed on record of this writ petition.

A compilation of documents was placed on the record of this Court and on the basis of those documents the Court held as follows :--

Uniformly, in each Show Cause Notice and charge-sheet, it has been alleged that the act imputed to the petitioner was a misconduct under the

Model Standing Orders. It is not possible to ignore the cumulative effect of this conduct on the part of the first respondent employer. To that

extent, the contention of Dr. Kulkarni needs to be accepted. If an employed continuously and consistently proposes and takes action against its

employee on the footing that he is covered by the Model Standing Orders (thereby implying that the employee is a ""workman"" within the meaning

of the Act), then such employer must be estopped from denying the said fact when a dispute regarding the dismissal of the employee finally lands

up before an industrial adjudicator.

The decision rendered by Hon''ble Mr. Justice B.N. Srikrishna therefore, clearly spells out that if an employer continuously and consistently

proposes and takes action against its employee on the footing that he is covered by the Model Standing Orders, then in such a case an employer

should be estopped from denying the said fact when the dispute arises before the Industrial Adjudicator. A Continuous and consistent course of

action is the test.

Along similar lines is the judgment of Hon''ble Mr. Justice F.I. Rebello, in Cricket Club of India v. Baljit Shyam 1998(1) CLR 570. The

appointment of the workman clearly spelt out thus in Clause 3 that the workmen would be governed by the Standing Orders and service conditions

of the Club prevalent from time to time. That the learned Single Judge did not rest the judgment on this fact alone is clear from the following

observations :--

""Apart from that the nature of duties of the House Keeper were also on record and they have been reproduced in the order of the Labour Court.

At any rate no material was produced to show that the respondent No. 1 was doing work mainly supervisory in nature. From the material on

record and considering the judgment in the case of S.A. Sarang v. W.G. Forge and Allied Industries Ltd. and Ors. (supra) the Industrial Court

was right in reversing the order of the Labour Court.

In other words, apart from the clause in the letter of appointment which adverted to the Standing Order, the nature of duties of the workman which

were on record showed that those duties did not take him outside the purview of Section 2(s) of Industrial Disputes Act, 1947. The learned Single

Judge noted that at any rate no material had been produced to show that the workman was doing work mainly of a supervisory nature. This is

contra distinguished from the facts of the present case. In the present case, it is apparent that right from the first affidavit which was filed before the

Division Bench as well as subsequently thereafter in the written statement, the primary case of the employer was that the petitioner was not a

workman within the meaning of Section 3(13) of the Act, since the work which was being carried out by him was mainly of a technical and

supervisory nature. From the evidence which is on record, it is clear that the nature of the work was not such as would bring the petitioner within

the purview of the definition of the expression ""employee"" within the meaning of Section 3(13) of the Act.

10. In the circumstances, therefore, the finding which has been arrived at by both the Courts below does not warrant interference by this Court

under Article 226 of Constitution of India. The petition shall stand dismissed. However, in the facts and circumstances of the case, the order of

costs that has been imposed on the petitioner, should in my view, be vacated. Parties are directed to bear their own costs in the proceedings.